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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 924

WABASH VALLEY COACH CO., A CORPORATION,
Petitioner,

vs.

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA AND BRIEF IN SUPPORT THEREOF.

THOMAS F. O'MARA,
Counsel for Petitioner,
Wabash Valley Coach Co.

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7. The holdings of the Supreme Court, that petitioner was without interest and only a nominal party and also that stockholder's meetings of the corporate petitioner were forever interdicted by the terms of the judgment reversed, are both ill-founded, untenable and insufficient to obviate review, such questions being implicit in the federal claim presented 42
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 924

WABASH VALLEY COACH CO., A CORPORATION,
Petitioner,

vs.

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Valley Coach Co., in the above entitled cause, shows:

A.

Jurisdictional Statement.

Jurisdiction of this petition is based upon Section 237 of the Judicial Code amended Sub-section b, Section 344

(28 U. S. C. A.). The petitioner set up its constitutional right under Section 1 of the Fourteenth Amendment of the Constitution of the United States by way of a Motion to Dismiss the Appeal in the Supreme Court of Indiana.

The judgment appealed to the Supreme Court of Indiana was rendered in the Superior Court of Vigo County No. 2, for the use and benefit of the petitioner-corporation in a stockholder's suit brought by Charles A. Turner, a respondent herein. This judgment canceled as void, certain shares of the corporation's outstanding stock acquired and held by the respondent Sales, ordered the cancelled stock surrendered to the petitioner and enjoined the sale of unissued stock of the corporation for less than par. A "vacation appeal" in which notice to all parties to a judgment is required was filed by the said Sales, individually and as President and Secretary-Treasurer respectively of the corporation by an assignment of errors naming this petitioner as an appellant. The legal counsel signing and filing the assignment of errors was selected by the Sales, respondents herein, and appeared both for them and this petitioner notwithstanding the conflict of interest. No notice was given to the corporation. The Petitioner's claim of right was based on Section 1 of the Fourteenth Amendment of the Federal Constitution securing to the petitioner the right to due process and the equal protection of the laws thereunder, including in this case the right of notice of the said appeal and to be bound by counsel selected by and acting for the persons against whom the judgment was obtained. Want of due process was therein set up under the holding of *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 and *Glasser* v. *United States* (1942) 315 U. S. 60, 76. These claims were

denied by the Supreme Court of Indiana through its ruling striking out the Motion to Dismiss the appeal.

The State Supreme Court at the same time reversed the judgment of the trial court and thus annulled the order of cancellation and surrender to petitioner corporation of the shares of stock in controversy and also thereby annulled the injunctive decree against the issue of authorized stock for less than par.

The judgment of the Supreme Court of Indiana was rendered on January 14, 1943, a petition for re-hearing was seasonably filed on February 2, 1943 (R. 125) and overruled on February 8, 1943 (R. 131).

The judgment of the trial court had been rendered on January 28, 1942. A "vacation appeal" was taken by the two Sales individually and respectively as President and Secretary of the corporation petitioner, giving notice to Charles A. Turner, the plaintiff below and respondent herein but giving no notice to this petitioner, the Wabash Valley Coach Company, merely assuming to join it as an appellant in the assignment of errors which together with the transcript of the proceedings of the trial court was filed on April 22, 1942 as appears in the court's opinion. The title to this cause in the Supreme Court of Indiana as it appears in the assignment of errors was as follows: No. 27718, Wabash Valley Coach Co., Gertrude B. Sale, President, Wabash Valley Coach Co., Burwell W. Sale, Secretary-Treasurer, Wabash Valley Coach Co., Gertrude B. Sale, Burwell W. Sale, Appellants, vs. Charles A. Turner, Appellee. The briefing of the case in the Supreme Court was concluded on August 15, 1942, and the petitioner's Motion to Dismiss was filed on October 9, 1942 (R. 38).

However as appears in the petitioner's Motion to Dismiss the appellants Gertrude B. Sale and Burwell W. Sale were until the judgment of January 14, 1942 the majority stockholders of the corporation and until August 17, 1942 constituted the majority of its board of directors and also were respectively its President and Secretary. The corporation was thus in the hands of its respondent officers, adverse parties to it, until on the annual stockholders' meeting day August 17, 1942, a new board of directors was elected by the majority of the common stock thereof remaining after the cancellation of the stock by the judgment of the trial court. At that time a new board of directors was elected and new officers were selected to succeed the said Sales as President and Secretary. The new officers selected new counsel for the corporation who at the first opportunity after a reasonable time for investigation and preparation filed the said Motion to Dismiss the appeal on October 9, 1940 (R. 37) before the argument of the cause below. The petitioner contends also that by virtue of the judgment below the corporation-petitioner became vested with a property interest of which it could not be deprived under the due process clause of the Fourteenth Amendment of the Federal constitution without notice to it or though its purported void joinder as an appellant from the judgment of which it was the beneficiary, under the legal doctrine and rationale of a stockholder's derivative suit prevailing in Indiana which the Supreme Court of Indiana did not in this case profess to alter or modify.

The assignment of errors upon appeal in Indiana is in the nature of a complaint, and by the purported, though void, joinder of this petitioner-corporation as an appellant therein, it was unlawfully made to appear as taking affirmative

action to abrogate the judgment in its own favor. Naturally this question could be raised for the first time only in the Supreme Court and no action by the corporation itself to nullify the purported joinder was possible until after the regular annual stockholders' meeting held on August 17, 1942.

There was no conflict of interests between this petitioner-corporation and Charles A. Turner, the stockholder, plaintiff-appellee below, as the Supreme Court itself referred to him as having an interest "adverse to the Sales," against whom the judgment was recovered. The Supreme Court itself made no finding of facts.

The material portion of the court's opinion is set out in Appendix 1 to the petitioner's brief hereto attached, p. 59, at the close of which the judgment of the Supreme Court of Indiana appears.

The judgment and opinion of the State Supreme Court appears in *Wabash Valley Coach Co. et al.* v. *Turner* (1943) — Ind. —, 46 N. E. (2d) 212, 218 (Official report not yet published).

I

Summary Statement of the Matter Involved.

1. This petitioner, the Wabash Valley Coach Co., seeks by this petition for the writ of certiorari to review the judgment of the Supreme Court of Indiana, rendered in this cause on January 14, 1943, reversing a judgment of the trial court, although on the face of the assignment of errors in the Supreme Court of Indiana this petitioner is made to appear as an appellant, its joinder as appellant being challenged in the State Supreme Court under the due process and equal protection clauses of the Fourteenth Amendment.

While this petitioner was joined as a co-defendant in the trial court in the stockholder suit of Charles A. Turner, named as respondent above, the suit under the theory of a stockholder's derivative suit prevailing in Indiana, as elsewhere, was instituted by said Turner, a stockholder, for and on behalf of the corporation against Gertrude B. Sale and Burwell W. Sale, Gertrude B. Sale as President of Wabash Valley Coach Co., and Burwell W. Sale as Secretary-Treasurer of Wabash Valley Coach Co., as co-defendants with Wabash Valley Coach Co., by reason of which there was an actual conflict of interest between said corporation and its co-defendants.

2. The respondent, Charles A. Turner, on August 1, 1939 began a stockholder's suit in the Superior Court of Vigo County, No. 2, against Wabash Valley Coach Co., petitioner herein (also designated in the pleadings as Wabash Valley Coach Company), Gertrude B. Sale, as President of the Wabash Valley Coach Co., Burwell W. Sale, as Secretary-Treasurer thereof, Gertrude B. Sale and Burwell W. Sale, individually, alleging that 108.77 shares of common stock of said company had been issued without consideration as dividend stock to and acquired and were then held by Burwell W. Sale and Gertrude B. Sale, and that such issue was in violation of Sections 21 and 22 of Chapter 35, Ind. Acts 1921; under which this petitioner was organized as a corporation, and also in violation of Section 1, Chapter 206, Ind. Acts 1921; and prayed for the cancellation of this stock and for an immediate restraining order, temporary and final injunctions against the issue or sale to said Sales or any other persons of further stock for less than par (R. 2).

Answers both in denial and containing affirmative defenses were filed (R. 16).

The trial court's findings (R. 21) were: that the challenged shares had been issued without consideration, in

violation of the statutes pleaded, the certificates thereof were void and should be cancelled, and showed the respondent, Turner, owning 100 out of the total 150 outstanding shares legally issued and uncancelled. The court concluded the law was with the plaintiff, that the disputed shares should be cancelled and "the temporary injunction should be made permanent and continued in full force and effect" (R. 26). A final judgment to that effect was entered (R. 26). The text of this final judgment as well as the text of the temporary injunction and the finding preceding the same are set out in Appendix B to this Petition as the same are important for handy reference in the consideration of the State Supreme Court's opinion.

3. Proceedings on Appeal

(a) The appeal reached the Supreme Court of Indiana only as a "vacation appeal," and it was so characterized in the opinion of the court. (See opinion below—46 N. E. (2d) 212, 217.)

It is not disputed that no notice of appeal was given this petitioner and that applicable State Statutes and Rules of Court are mandatory in requiring notice of vacation appeals to be given to "adverse" parties. Sections 2-3206, 2-3212, 2-3213, 2-3214—B. Ind. R. S. 1933, and Rules 2-3 and 2-30, B. Ind. R. S.—1942 Supp.

It was the position of the respondents, the two Sales, that the joining of this petitioner as an appellant by the action of the same counsel although representing and selected by the two Sales, was valid and was effective in making this petitioner a party appellant, thus dispensing with the notice otherwise required.

Counsel for the petitioner disputing the above views of the respondents, the Sales, was not chosen by the respondents, the Sales, but selected by the newly elected officers

following the regular annual stockholders' meeting, next succeeding the filing of the appeal. This was the first opportunity the corporation had of obtaining counsel independent of the two Sales, and consequently the first opportunity the petitioner had to raise the validity of its joinder in the appeal as an appellant. The view presented by new counsel appearing specially for the petitioner was that the supervening force of due process and the equal protection clauses of the Fourteenth Amendment necessarily inhibited the selection by the officers of the corporation of the same counsel to represent the corporation and also themselves who were adverse in interest to it and its fiduciaries as well, and that consequently the officers selecting the dual counsel who filed the assignment of errors had no power to join the corporation as an appellant against its interest, and to their own advantage.

(b) The petitioner's special claim of constitutional right challenging the jurisdiction of the State Supreme Court to proceed was set up in its "Special Appearance and Verified Motion to Dismiss the Appeal" (R. 38).

This motion filed October 5, 1942, alleged that the respondents, Gertrude B. Sale and Burwell W. Sale were at the time of the filing of the assignment of errors in the Supreme Court of Indiana, the then directors of this petitioner and also respectively its President and Secretary, by virtue of previous majority stock control held by means of the stock cancelled by the judgment, and thus at that time sustained a fiduciary relationship to this corporation petitioner, and that they had selected the legal counsel who signed and filed the assignment of errors in the name of the respondents, the two Sales, and of this petitioner as co-appellants seeking to reverse the judgment of the trial court; and that said Sales "could not claim the benefit of any

appeal lodged therein through the ministration and services of said counsel'' (R. 64).

This motion expressly set up that to proceed with the appeal when the court had no jurisdiction of the petitioner or of the cause of action appealed, inasmuch as no notice was ever given to the petitioner of the filing of the vacation appeal, would deprive the petitioner of its property without due process of law and would deny to it the equal protection of the laws secured to it under the Fourteenth Amendment of the Constitution of the United States, and it further challenged the dual representation of the Sales, respondents herein, and of this petitioner by the same counsel selected by the Sales who were adverse in interest to it, and who, although fiduciaries of the petitioner, sought to reverse the judgment of the trial court beneficial to it and injurious to the respondents, the Sales, as depriving this petitioner of its property without due process of law and in denial of the equal protection of the laws secured to it under the Fourteenth Amendment (R. 63-65).

It claimed that this void dual representation of counsel did not constitute a voluntary appearance on the part of the corporation so as to confer jurisdiction on the Supreme Court over the appeal or over the person of the corporation, and that to recognize such appearance as binding upon the corporation would deny to it the equal protection of the laws and due process of law in violation of the Fourteenth Amendment. It further declared that the lodging of the appeal through the void dual representation challenged as aforesaid and without notice to it rendered the appeal itself void (R. 65).

It further asserted that the Supreme Court did not in the absence of this petitioner have before it the parties necessary to the complete determination of the controversy and of the question involved, namely the validity of the issue of

the stock cancelled by the judgment of the trial court, and that to proceed would deprive this petitioner of its property in violation of its constitutional claim under the Fourteenth Amendment of the Federal Constitution (R. 66).

It further asserted that a denial of recognition of the newly chosen counsel and of the newly elected officers would deprive the corporation of valuable rights and deny to it due process of law and the equal protection of the laws secured under the Fourteenth Amendment aforesaid (R. 61).

The statement of the claim of right of this petitioner secured to it under the Fourteenth Amendment of the Constitution of the United States was elaborate and explicit and quite too extensive to copy verbatim in this petition proper, but pertinent extracts from the petitioner's verified motion to dismiss the appeal, disclosing the claims of constitutional right more fully, are subjoined in Appendix C, and by reference made a part of this petition.

The Motion to Dismiss explained the delay of the Wabash Valley Coach Co. to appear by counsel representing it alone and not representing its adversaries in that the corporation had no opportunity to do so until after the statutory regular annual stockholders' meeting on August 17, 1942, when a new Board of Directors not dominated by the Sales were elected (R. 45).

This new Board of Directors chose new officers, including Charles A. Turner as President and Frank P. Walters as Secretary. The new Board consisted of the former director Burwell W. Sale, and the new members Sam Hammond and Charles A. Turner. Through their action the present counsel for the petitioner, Thomas F. O'Mara, was authorized and employed to represent this petitioner (R. 48). This counsel was unfamiliar with the litigation and required time to investigate and prepare the Motion to Dismiss, and did file the same with due diligence on October 5, 1942.

With the petition was filed this counsel's authority to appear, under the hand and seal of the petitioner corporation (R. 37).

Supporting the authority of the Board of Directors to select new counsel the Motion to Dismiss set up in detail the proceedings and a certified copy of the minutes of the stockholders' and directors' meetings of August 17, 1942, showing the same were held in conformity with the Articles of Incorporation pleaded in the Motion and also with the provisions of the By-Laws of the corporation, disclosing that a quorum was present of all stock not ordered cancelled and that the majority thereof voted for the newly elected Board of Directors, Sam Hammond, Charles A. Turner, respondent, (appellee below) and Burwell W. Sale, who was personally present at these meetings (R. 46).

The motion itself and contents were duly verified in positive terms. (R. 67), so as to be competent evidence of its contents.

It pleaded the recognition of the new Board and the newly elected President by Burwell W. Sale and a former director, Blanche Stitt, by their specific acts and acknowledgments, and the possession and operation of all of the offices and equipment and the recognition of the new officers by the public in general, by all the agents and employees of the company, and the newly elected officers were in daily, constant charge of the public utility operated by the petitioner, and asserted their *de jure* election, and that they were at least the *de facto* officers of the corporation (R. 61).

(c) An answer but not verified as required by law to constitute evidence (*Henderson* v. *Reynolds* (1907) 168 Ind. 522, 526, 530; *Marshall* v. *Matson* (1908) 171 Ind. 238; *Ledger Pub. Co.* v. *Scott* (1923) 193 Ind. 683; *Hoosier Nat'l.*

Life Co. v. *Gary Electric Co.* (1938) 214 Ind. 957) was filed to which a properly verified Reply was filed.

But the court below did not rest its decision upon any insufficiency or defect in the election of the new officers so far as any defect in the meetings was involved but treated the stockholders' meetings as regular and sufficient in form and other requirements, merely holding as more fully noted below that no stockholders' meetings could be legally held merely because the final injunction was interpreted to forbid all stockholders' meetings forever.

4. Analysis of the Decision of the Supreme Court of Indiana.

46 N. E. (2d) 212, Advance N. E. Report, March 3, 1943.

The Supreme Court below treated the proceedings as a "vacation appeal" and acknowledged the necessity of notice in such cases as to all interested parties who did not join. It held that the lack of notice to Wabash Valley Coach Co. was obviated in that "the corporation appealed in its own right through its attorneys of record below," adding "that was sufficient to give the court jurisdiction of the person of the corporation". The court said:

> "There is no contention that the attorneys who filed the appeal were not then authorized by the then officers of the corporation to appear for the corporation and perfect the appeal for it. The other parties appellant were not required to take any further steps to bring the corporation into court, and their appeal cannot be defeated by the effort of new and later officers of the company to revoke the action of the former officers."

The Court thus misapprehended the contention of the petitioner that the "lodging of the appeal was void." It misapprehended the fundamental constitutional contention which was not, that the new officers were revoking "the ac-

tion of the former officers," but that the action of the former officers in joining the petitioner as an appellant was itself void under due process. The very power of the officer of a corporation to use his office for his personal advantage but against the interest of the corporation was involved. In the words of Mr. Justice Douglas in *Pepper* v. *Lytton*, 308 U. S. 309, 311: "He can not use his power for his personal advantage but to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."

The court below did not expressly decide whether the new officers of the corporation selecting counsel, who presented the motion of the petitioner to dismiss were *de jure* or *de facto* or were neither *de jure* or *de facto*. The court by an extraordinary and ill-founded holding, if the same may be called a holding, rather than an intimation, disposed of the authority of counsel presenting the petitioner's said motion and left to inference only its views upon the status of the newly elected officers. The Court on this point said:

> "* * * we notice the suggestion in the court below that there was a temporary injunction as follows:
> "It Is Therefore Ordered Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held, all until the further order of this Court."

The ruling was ill-founded in declaring that the promise and condition upon which the temporary injunction was granted became a part of the injunctive order so as to form a part of the permanent injunction, especially when so to treat it would interdict forever all future stockholders' meetings against the statutory requirement of the very

incorporation Act of 1921, that directors be elected by the stockholders *annually*. It was only a mere *modus vivendi*.

The court below held the petitioner was only "a nominal party" without interest, yet did not profess to change the rationale of stockholder's derivative suits prevailing in Indiana and in this court. This rationale set out in Pomeroy Equity Jurisprudence Section 1095, Vol. 4, page 276 (Last Ed.) is expressly approved in *Tevis* v. *Hammersmith* (1903) 31 Ind. App. 281, 283, 284 and also in *Carter* v. *Ford Plate Glass Co.* (1881), 85 Ind. 180, expressly following *Davenport* v. *Dows* (1873), 18 Wall. 626, 627, declaring the corporation is the real "beneficiary" of the judgment obtained.

Although the court did not in its decision once refer to the constitutional claims of right of this petitioner, it necessarily denied them by its ruling. The questions which the Supreme Court below decided were necessarily intermingled and interwoven with the assertion and determination of the Federal questions involved. These holdings were ill-founded, untenable and mere pretexts to evade a decision of the constitutional question in terms and did not constitute adequate non-Federal grounds upon which to base its decision; and consequently all these questions are properly Federal questions and for the independent and exclusive determination of the Supreme Court of the United States upon this petition for certiorari.

Ward v. *Love County* (1920) 253 U. S. 17, 22, 23 (64 L. Ed. 751, 758);

Lawrence v. *State Tax Commission* (1931) 286 U. S. 276, 282, 283 (76 L. Ed. 1102, 1107) and cases cited therein;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.* (1916) 243 U. S. 157, 164 (61 L. Ed. 644, 649);

Leathe v. *Thomas* (1907) 207 U. S. 93, 99 (52 L. Ed. 118, 120).

This case was decided by the Supreme Court of Indiana in contravention of the rulings in *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 (85 L. Ed. 22, 28, 29) and *Glasser* v. *United States* (1942) 315 U. S. 60, 76 (86 L. Ed. 680, 702), which are applicable precedents, holding that the dual representation of contingently or potentially conflicting interests is sufficient to vitiate decrees founded thereon.

The court also denied a hearing to this petitioner in refusing to recognize the counsel chosen by the newly elected officers of the corporation, and in refusing to recognize such officers, and by striking out the constitutional claim of right of this petitioner, as against the express contention:

> "That a denial of recognition to said legal representative and said newly chosen officers will deny this corporation due process of law and the equal protection of the laws, and will deprive this corporation of valuable property rights in contravention of the Fourteenth Amendment of the Constitution of the United States." (R. 61.)

The decision of the court did not profess to alter the prevailing *de facto* doctrine long established in Indiana, nor the doctrine that the title to public or private office could not be collaterally decided; besides this holding of the Supreme Court was in the face of duly verified facts uncontradicted by any verified showing that the officers of the petitioner under certified corporate proceedings of their election were actually in possession of and operating the property of the corporation, and filling the corporate offices of those whose terms had actually expired, some of whom had recognized the title of the newly chosen officers.

Petitioner insists the present is a flagrant instance of the vice of the dual representation of interests in actual conflict, aggravated by the circumstance that the dominant parties constraining the selection of their own counsel as counsel

for their adversary were also its trustees. The necessarily invalidating effect of such conduct from the standpoint of due process of law under the Fourteenth Amendment has never been in terms pronounced by this court, although such a situation is undoubtedly within and requires the application of the foregoing and analogous precedents. Both from the standpoint of national interest and importance and the unique grievance here presented this case clearly merits the granting of the writ prayed.

The principles held in *Johnson* v. *Zerbst* (1937), 304 U. S. 458, 463, 464, are also applicable, as well as the classic lack of notice cases: *Windsor* v. *McVeigh* (1876), 93 U. S. 274; *Pennoyer* v. *Neff* (1878), 95 U. S. 714, 733; *Scott* v. *McNeal* (1894), 154 U. S. 34; *Standard Oil Co.* v. *The Missouri ex Rel. Hadley* (1912), 224 U. S. 270, 287 (56 L. Ed. 760, 770); and the unauthorized appearance cases: *National Exchange Bank* v. *Wiley* (1904), 195 U. S. 257, 270 (49 L. Ed. 184, 190); *Hall* v. *Lanning* (1876), 91 U. S. 160, 170 (23 L. Ed. 271, 274, 275); *Shelton* v. *Teflin et al.* (1848), 6 How. 162, 186 (12 L. Ed. 387, 397); and the cases covering changes in judgment after term: *Wetmore* v. *Karrick* (1907), 205 U. S. 141, and analogous cases; *United States* v. *Pink* (1941), 315 U. S. 203, 217; and the cases establishing the vulnerability of State Supreme Court proceedings for want of due process: *Saunders* v. *Shaw* (1917), 244 U. S. 317, 320; *Brinkerhoff-Farris, etc., Co.* v. *Hill* (1930), 281 U. S. 673, 681, 682; *Carlson* v. *Washington ex Rel.* (1914), 234 U. S. 103, 106 (58 L. Ed. 1237, 1238).

Moreover the factual situation out of which the constitutional claims herein arise, namely, a derivative stockholder's suit, wherein the losing officers against whom the recovery for the benefit of the corporation is enforceable, sought to cause appeal to be made in the name of the corporation against its own interest involves constitutional aspects of appellate procedure and of minority stockhold-

ers' rights of national importance in an increasingly important field wherein the principles of fair play as embodied in the Fourteenth Amendment constantly require vindication. Upon the whole case counsel for this petitioner respectfully venture the prediction that a decision by this court of the questions here sought to be reviewed will establish a landmark in the development of the fair-play concept of the Fourteenth Amendment.

5. Petition for Rehearing and Mandate.

A petition for rehearing was filed by Wabash Valley Coach Co. through said newly chosen counsel within the twenty (20) days after the rendition of the judgment of the reversal on February 2, 1943 (R. 125) within the time provided for by Rule 2-22 of the Supreme Court of Indiana. (The Supreme Court Rule 2-22, Supplemental Pocket Part, Burns Ind. Stat. Ann. (1933) page 173.)

This petitioner reiterated the grounds set out in the Petitioner's Motion to Dismiss and specifically charged (Reasons 2, 3, 4 and 8) that the striking out of the Verified Motion to Dismiss denied to this petitioner the right of due process and the equal protection of the laws secured to the petitioner under the Fourteenth Amendment of the Federal Constitution. In Reasons 6 and 9 petitioner contended that the judgment of the court that the petitioner had no interest in the judgment appealed from and that the permanent injunction inhibited all future stockholders' meetings and thereby cut off the authority of newly selected counsel presenting petitioner's Motion were erroneous and untenable and deprived the petitioner of due process and equal protection of the laws under Section 1 of the Fourteenth Amendment.

This motion for rehearing was entertained and overruled without an opinion by the Supreme Court of Indiana on February 8, 1943 (R. 131).

A mandate of reversal was issued in the form of a certified copy of the judgment and the opinion of the Supreme Court was issued and transmitted to the court on February 16th, 1943.

The judgment, decision and opinion of the Supreme Court of Indiana appear in — Ind. —, (Not yet in official report) 46 N. E. (2d) 212—Current N. E. Advance Report—Indiana Addition—(Points 13 and 14, pages 217 and 218, deal specifically with the Motion to Dismiss).

It is urged that this petition for a writ of certiorari itself without reference to appendices or the brief which follows is sufficient in both its statement of facts and law to show the propriety of the granting of the writ. However, for the convenience of the court, full appendices are attached, showing the material portions of the record considerably in detail. A full statement of the principles and authorities upon which the petition relies appear in the attached brief. The material portion of the opinion of the court below appears in appendix 1 to the brief. Also a comprehensive summary of the argument appears in the brief, page 40 below, and a full outline appears above in the index.

(Separate Assignments of Error.)

Reasons for Allowance of the Writ.

1. The court erred in its judgment striking out the Special Appearance and Verified Motion of this Petitioner to Dismiss the Appeal below (and reversing the judgment of the trial court), setting up the claims of right of the petitioner alleged therein to arise under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that no notice of the pendency of said appeal was given as required by the Statutes of the State to the said petitioner, the said petitioner not having voluntarily appeared

in said cause except to move the dismissal thereof in said Motion to Dismiss.

2. In this case there was specifically claimed by this petitioner in the Supreme Court of Indiana, its right, specifically asserted to be derived from and based upon Section 1 of the Fourteenth Amendment of the Constitution of the United States, to appear, to be heard and to be bound in said cause in the Supreme Court of Indiana only by and through counsel of its own independent selection, and not to be bound by counsel selected by the parties adverse to it in interest and who in breach of their fiduciary obligation as its officers at the time were seeking to reverse the judgment of the trial court which was beneficial to the petitioner.

3. The Supreme Court of Indiana erred in denying the claim of right of this petitioner under Section 1 of the Fourteenth Amendment of the Federal Constitution that it be not required to appear and be bound by counsel who had been selected by the fiduciaries of said corporation, against whom the judgment being appealed was recovered and enforceable for the benefit of the petitioner.

4. The Supreme Court of Indiana erred in holding that the petitioner corporation had voluntarily appeared in said cause as an appellant through the agency of the same legal counsel who had been selected by and represented its officers, then and there its fiduciaries and adverse in interest in respect to the judgment appealed in said cause, thereby erroneously denying the claim of right of said petitioner corporation derived from and based upon Section 1 of the Fourteenth Amendment of the Federal Constitution, that said dual representation was a denial of due process of law and the equal protection of the laws thereunder.

5. The Supreme Court of Indiana erred in refusing to recognize and to permit to appear on behalf of this peti-

tioner, its counsel independently selected by said petitioner and not by Burwell W. Sale and Gertrude B. Sale, against whom the judgment appealed from was rendered in favor of the petitioner, thereby erroneously denying to the petitioner its claim of right, as a part of the due process of law and the equal protection of the laws secured to said petitioner under Section 1 of the Fourteenth Amendment of the Federal Constitution, duly set up in the said Supreme Court of Indiana by said petitioner.

6. The court below erroneously held it had jurisdiction to proceed and to reverse the judgment of the trial court, and thereby erroneously ruled against and denied the claim of right of this petitioner set up in its Verified Motion to Dismiss the Appeal based upon the first section of the Fourteenth Amendment of the Constitution of the United States, claiming the appeal proceeding was *coram non judice* for want of notice to this petitioner and on account of the nullity of the joinder of this petitioner as an appellant through void, dual representation of legal counsel.

7. The Supreme Court of Indiana erred in holding that the petitioner was only "a nominal party" to the judgment appealed from.

8. The Supreme Court of Indiana erred in holding that the terms of the final judgment being appealed from precluded the holding of future meetings of its stockholders.

9. The Supreme Court of Indiana erred in holding that counsel filing the Special Appearance and Verified Motion to Dismiss of said Petitioner were without jurisdiction.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said

Supreme Court of Indiana had in the case numbered and entitled on its docket, No. 27,718, Wabash Valley Coach Co., Gertrude B. Sale, as President of the Wabash Valley Coach Co., Burwell W. Sale, as Secretary-Treasurer of Wabash Valley Coach Co., Gertrude B. Sale, Burwell W. Sale, Appellants, *vs.* Charles A. Turner, Appellee, to the end that this cause may be reviewed and determined by the court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of Indiana be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated April 7th, 1943.

WABASH VALLEY COACH CO.,
Petitioner Herein;
CHARLES A. TURNER,
President;
By THOMAS F. O'MARA,
Counsel for Petitioner,
300 Grand Opera Bldg.,
Terre Haute, Ind.

Attest:
FRANK P. WALTERS,
Secretary.

APPENDIX A.

Indiana Statutes and Supreme Court Rules Governing Appeals.

(a)

Relating to Vacation Appeals:

2-3206 (700) Appeal after term—Notice to appellees—Service of.—After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party, or his attorney, and also on the clerk of the court in which the proceedings were had, stating the appeal from the judgment, or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record, and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the Supreme Court, who shall indorse thereon the time of filing, and issue a notice of the appeal to the appellee. The appellee, or appellees, shall be served with such notice of appeal by the sheriff of the Supreme Court, or by such other officer as is authorized by law to serve the same, and such service shall be made in the same manner as a summons or other process, is required by law to be served upon any such appellee in civil actions filed in circuit courts of this state. (Acts 1881 (Spec. Sess.), ch. 38, *635, p. 240; 1933, ch. 106, *1, p. 694.)

2-3208 (702) Appeal after term—Bond—Supersedeas.—An appeal taken after the close of the term shall not stay execution or other proceedings in the court below unless an order to that effect be granted by the Supreme Court in term, or any judge thereof in term or vacation, which shall be indorsed on the transcript. The court or judge shall, at the time of making the order, direct that the appellant shall give bond to the appellee, which condition is required when an appeal is taken during the term at which the judgment is rendered. (Acts 1881 (Spec. Sess.), ch. 38, *642, p. 240.)

2-3213 (707) Vacation appeal by part of coparties—Notice to coparties necessary.—A part of several coparties may appeal to the Supreme or Appellate Court, but, in such case, they must serve written notice of the appeal upon all the other coparties or their attorneys of record, and file proof thereof with the clerk of such court, and whenever it shall be made to appear to such court by satisfactory proof that such other coparties, or any of them, are not residents of the state and have no attorneys of record in the court below, or that such attorneys cannot be served with such notice in the state, the court may order that notice of the pendency of the appeal be given to such non-resident coparties in some newspaper printed and published in the state, for three (3) weeks successively; after which, if proper notice has been given the appellees, the court shall proceed in all respects as if said non-resident coparties had been personally served with notice of said appeal. After notice to said coparties in either of the ways provided in said section, unless they appear and decline to join in said appeal, they shall be regarded as properly joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be stricken out, on motion; and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under disabilities: Provided, however, That nothing in this act shall be construed to repeal or modify an act entitled, An Act in relation to appeals to the Supreme and Appellate Court, approved March 8, 1895, (Acts of 1895, page 179), or any part thereof, but the provisions of said act shall continue in force the same as if it has been enacted after the taking effect of this act. (Acts 1881 (Spec. Sess.), ch. 38, *629, p. 240; 1899, ch. 3, *1, p. 5.)

2-3214 (708) Appeal by coparties—Making appellants appellees and vice versa—Notice, how given.—In all appeals by one or more coparties now pending in the Supreme or Appellate Courts of Indiana, or hereafter taken to either of such courts, the parties named in such appeals shall be properly before such courts for all purposes, if duly served with notice as required by law, whether such parties shall

be named as appellants or as appellees, and the fact that one or more parties are named as appellants when they should be appellees, or appellees when they should be appellants, shall not affect the jurisdiction of the court or be cause for dismissing such appeal: Provided, however, That when notice of such appeal is required to give the court jurisdiction over the appellees or the coparties not appealing, notice shall be served on such coparties in the same manner as is now or may hereafter be required to be given appellees. (Acts 1925, ch. 19, *1, p. 41.)

Supreme Court Rules:

Rule 2-1. Statutory Rules Adopted.—Chapter 76, Acts of 1937, has heretofore been abrogated. All other rules of appellate procedure and practice adopted by statutory enactment and in effect on June 21, 1937, shall continue in full force and effect, except as herein otherwise provided.

Rule 2-2. Time for Appeal.—In taking appeals to the Supreme or Appellate Court from final judgments in civil and criminal cases, the assignment of errors and transcript of the record must be filed in the office of the clerk of the court to which the appeal is taken within 90 days after the date of the judgment or the ruling on the motion for a new trial. If within the time for filing the assignment of errors and the transcript of the record as above provided it is made to appear by petition, notice of the petition having been given to the adverse parties, that notwithstanding due diligence on the part of the parties seeking to appeal, it has been impossible, and will be impossible, to procure a bill of exceptions containing the evidence in time to permit the filing of the assignment of errors and transcript on appeal within 90 days, the court to which the appeal is sought may in its discretion grant a reasonable extension of time within which to file said transcript, and may at the same time direct the trial court to extend the time granted for the filing of the bill of exceptions. When the appellant is under legal disability at the time the judgment is rendered, he may file the tran-

script of the record within 90 days after the removal of the disability.

Rule 2-3. Unperfected Term Appeal. If an appeal is begun as a term appeal, but one or more of the steps necessary to perfect such appeal is omitted, the appeal may be perfected under the rules governing vacation appeals.

Rule 2-8. Parties. The assignment of errors shall contain the full names of all parties to the judgment, and process, when necessary, shall issue accordingly.

Rule 2-11. Special Appearance. A special appearance shall be so designated, shall be in writing, and shall state the particular relief demanded, together with the facts in support thereof.

Rule 2-30 (Former Rule 36) Dismissal. Where a case not appealed in term has been on the docket for 30 days, and there is no appearance by the appellee and no steps taken to bring him into court, or where notice has been issued and proves ineffectual from any cause, and no steps are taken for 30 days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal.

(b)

Relating to Term Time Appeals:

2-3204 (698) Appeal during term—Stay, bond, transcript. —When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the court shall approve, and within such time as it shall direct, payable to the appellee, with condition that he will duly prosecute his appeal and abide by and pay the judgment and costs which may be rendered or affirmed against him; and if the appeal is taken from a judgment for the recovery of real property, or the possession thereof, by the party against whom the judgment for the recovery is rendered, then the condition of the bond shall further provide that the appellant shall also pay all damages which may be sustained by the appellee for the mesne profits, waste or dam-

age to the land during the pendency of the appeal; and if from a judgment for the recovery or return of personal property, or for such property or its value, then that if he deliver or return the property, he will also pay the reasonable value of its use and any damage it may sustain during the pendency of an appeal. The transcript shall be filed in the office of the clerk of the Supreme Court within sixty (60) days after filing the bond; it being provided that in any action now or hereafter pending, the court in which said appeal bond was filed, or the judge thereof in vacation, may grant a reasonable extension of the time for filing said transcript in the office of the clerk of the Supreme Court, upon written application made by any party appellant to said appeal, duly verified by such party or his attorney showing that said transcript can not be filed in said office of the clerk of the Supreme Court within sixty (60) days from the time of filing said appeal bond, which application shall show the date of the filing of the appeal bond in the trial court and such facts which prevent the filing of the transcript in the office of the clerk of the Supreme Court within sixty (60) days after filing the appeal bond, and also showing that the failure or inability to file such transcript within such sixty (60) days after filing such appeal bond was not caused by the negligence of the party asking for such extension; and provided further that such application shall be filed in the office of the clerk of the court in which application shall be filed in the office of the clerk of the court in which said appeal bond was filed within the time allowed by law for filing such transcript in the office of the clerk of the Supreme Court. The filing of the transcript in the office of the clerk of the Supreme Court within the extended time, as granted by the court in which such appeal bond was filed, or the judge thereof in vacation, shall be sufficient and effective to the same extent as though said transcript had been filed in the office of said clerk of the Supreme Court within sixty (60) days after the filing of said appeal bond. (Acts 1881 (Spec. Sess.), ch. 38, *632, p. 240; 1917, ch. 30, *1, p. 71).

Rules governing joinder of parties in the trial courts also governing appellate procedure where no other provision is

made under Buchanan *v.* Morris (1926) 198 Ind. 79 (151 N. E. 385).

APPENDIX B.

(A) The prayer of Plaintiff's complaint:

"Wherefore, Plaintiff asks and prays that said Defendants Burwell W. Sale and Gertrude B. Sale, and each of them, be permanently enjoined from issuing to themselves, or to any other person, certificates for shares from the unissued shares of the capital stock of said corporation for a sum or sums of money or for property less than the par value of said shares of capital stock or as payment for any debt shown on the books of the corporation to be due and owing to said Burwell W. Sale and Gertrude B. Sale, or either of them, and from voting, selling or transferring to any person all or any part of said 108.77 shares of the capital stock of the Defendant Wabash Valley Coach Company, issued to Burwell W. Sale in certificate No. 15, dated September 16, 1929; and that said shares of stock be canceled and declared null and void, and that said Defendants Burwell W. Sale and Gertrude B. Sale, and each of them, be required to account for and pay into the treasury of the Defendant Wabash Valley Coach Co. any and all sums of money wrongfully appropriated by them from the funds and assets of said corporation and that a restraining order be issued herein without notice restraining said Defendants Burwell W. Sale and Gertrude B. Sale, and each of them, from voting, selling or transferring to any person all or any part of said 108.77 shares of the capital stock of said Defendant corporation, Wabash Valley Coach Co., from issuing to themselves or to any other person certificates for shares from the unissued shares of the capital stock of said corporation for a sum or sums of money or for property less than the par value of said shares of capital stock or as payment for any debt shown on the books of the corporation to be due and owing to said Burwell W. Sale and Gertrude B. Sale, or either of them, until a hearing is had upon a temporary injunction, and for all other relief just and equitable in the premises." (R. 15-16)

(B) Finding and Temporary Injunction:

"The court after hearing the evidence and after being duly advised in the premises herein, finds for the plaintiff; that a temporary injunction be granted as prayed for by plaintiff in his petition for injunction. And the Court further finds that said temporary injunction be granted, providing that no meetings of the stockholders are held.

"It Is Therefore Ordered, Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held; all until the further order of this court." (R. 2)

(C) Fourth conclusion of Law and Final Injunction:

"4. The temporary injunction heretofore granted should be made permanent and continued in full force and effect" (R. 26).

"It is therefore ordered, adjudged and decreed by the Court that the temporary injunction heretofore granted in this cause be and the same hereby is made perpetual and permanent, and continued in full force and effect.

"It is further ordered, adjudged and decreed that the defendant, Gertrude B. Sale, surrender to the defendant, Wabash Valley Coach Company, for cancellation, stock certificate No. 17 of said corporation, issued on or as of the 17th day of September, 1929, to and in the name of said defendant, Gertrude B. Sale, and that upon surrender to it of said stock certificate No. 17 the defendant, Wabash Valley Coach Company, cancel or cause to be canceled upon its corporate records said stock certificate No. 17.

"It is further ordered, adjudged and decreed that the plaintiff recover his costs herein, taxed at $....." (R. 27).

APPENDIX C.

Further Digest of Petitioner's Special Appearance and Verified Motion to Dismiss (Petitioner's Claim of Constitutional Right).

(a) The following excerpts indicate the specific claims of right made by the petitioner.

It further set up:

"That said representation of the said Wabash Valley Coach Company through the same counsel as was selected by the said Sales as appellants, does not constitute due process of law under the said Fourteenth Amendment of the Constitution of the United States, but on the contrary operates to deny and does deny the Wabash Valley Coach Company the equal protection of the laws under said Fourteenth Amendment and, if treated as being binding upon said Wabash Valley Coach Company will deprive the Company of its interest in said judgment and its property rights in respect to its right to issue and sell shares of stock in lieu of the cancelled shares without due process of law and the equal protection of the laws in contravention of said amendment" (R. 64-65).

It pleaded:

"That the lodging and filing of said appeal is void on account of the said breach of trust of said officers, and the said Sales and Sales, appellants herein, cannot profit or avail themselves of their own wrong, in using and employing the attorney whom they selected to represent the corporation and in part obtained through the resources and credit of said corporation, also to lodge an appeal for them individually, that the said Wabash Valley Coach Company by reason of its interest in said judgment is not entitled to and does not claim to be entitled to appeal from the said judgment" (R. 65).

It further charged:

"That for the reasons aforesaid the said purported lodging of said appeal herein and the joining of said Wabash Valley Coach Company, as an appellant therein, through said void dual representation of counsel does not constitute a voluntary appearance so as to confer jurisdiction upon

this court over this appeal or over the persons of said corporation, and that treating or recognizing the said Wabash Valley Coach Company as appearing as an appellant, or said appeal as duly lodged herein, will deny to it the equal protection of the laws and due process of law, and thereby deprive it of its property all in contravention of the Fourteenth Amendment to the federal constitution" (R. 65).

"That the above entitled appeal as an entirety should be dismissed for want of jurisdiction herein, not only for the reasons herein before set out and upon the facts herein alleged and upon the record in this cause in that since the said Wabash Valley Coach Company has not legally been made an appellant in this case, and has not been notified as required by law as an adverse party to the appellants herein, although it is benefitted by said judgment, * * *" (R. 65-66).

It further alleged:

"That this court does not have before it the parties necessary to a complete determination of the controversy here involved or the complete determination and settlement of the question here involved, namely, the validity of the issue of the stock of this petitioner cancelled by the judgment below; that said question of the validity of the issue of said stock is a single and entire question and is wholly integral and not susceptible of determination as to any less than all the parties to the judgment."

It further alleged:

"That unless the said officers are recognized by this court, and the legal representation secured by them for said corporation is recognized by this court, then no representation of said corporation in this court can be had or is procurable independent of the control of the two said Sales, appellants herein; that a denial of recognition to said legal representative and said newly chosen officers will deny this corporation due process of law and the equal protection of the laws, and will deprive this corporation of valuable property rights in contravention of the Fourteenth Amendment of the Constitution of the United States" (R. 61).

"That there is no conflict of interest between said corporation and the said appellee, Turner, or said Walters;

that it is to the best interest of said corporation that said judgment remain unreversed, and that counsel filing this motion and authorized to appear for said corporation and file this motion be recognized and treated as truly representing this corporation before this court" (R. 61).

It further set up:

"That by reason of the said Wabash Valley Coach not being made a party to this appeal this court is without jurisdiction to proceed herein, among other reasons, because this court is without power to completely determine and settle the question involved herein and the controversy involved herein; and that further proceeding in this cause except to dismiss the said appeal denies due process of law and will operate to deprive and will deprive said Wabash Valley Coach Co. of its said property and interest in said judgment and its interest in having its right to issue and sell said cancelled stock unclouded without due process of law and in denial of the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States" (R. 66).

And further:

"That the said Wabash Valley Coach Company is a necessary and indispensable party to said appeal and to any judgment or determination of the court therein; that said Coach Company has not been validly represented in the appeal; that the pretended representation of counsel therefor is null and void" (R. 66-67).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 924

WABASH VALLEY COACH CO., A CORPORATION,
Petitioner,

vs.

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER,

Respondents.

The undersigned Wabash-Valley Coach Co., a corporation, by and through the undersigned President and Secretary of Wabash Valley Coach Company being duly authorized by the Board of Directors of said corporation do now hereby employ, authorize and direct Thomas F. O'Mara of Terre Haute, Indiana and a member of the Bar of the Supreme Court of the United States, to appear for said Wabash Valley Coach Co., a corporation duly organized and doing business under the laws of the state of Indiana with its principal office at Terre Haute, Indiana, and to represent the said corporation in the above entitled cause and in all other matters appertaining to a review in the Supreme Court of the United States of the judgment of the Supreme Court of Indiana rendered on the 14th day of January, 1943

in the course of an appeal in Cause No. 27,718 in said State Supreme Court reversing the judgment of the Superior Court of Vigo County, Indiana, No. 2, rendered on the 28th day of January, 1942: With full authority to act in all of said matters for and on behalf of and as attorney for said corporation.

In Witness whereof the said corporation, Wabash Valley Coach Co., hereunto sets its hand and seal by and through the undersigned President and Secretary thereof.

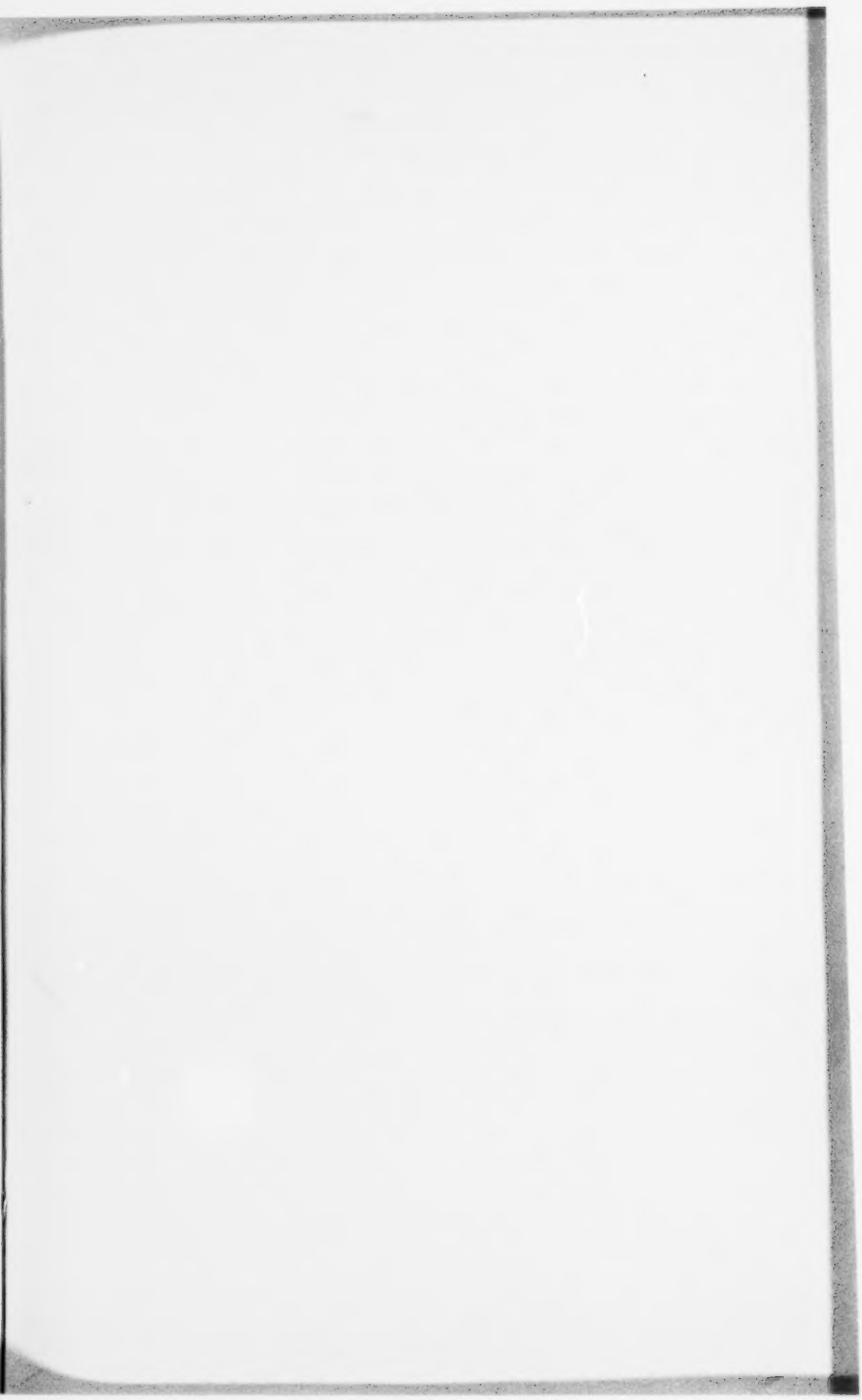
Dated this 7th day of March, 1943.

WABASH VALLEY COACH COMPANY,
By CHARLES A. TURNER,
President.

Attest:
FRANK P. WALTERS,
Secretary.

[SEAL.]

THOMAS F. O'MARA,
Counsel for Petitioners
WABASH VALLEY COACH CO.,
Address:
300 Grand Opera Bldg.,
Terre Haute, Ind.



SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction.

This court had jurisdiction of the Petition for a Writ of Certiorari to review the judgment of the State Supreme Court under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344 (b).

The judgment of the Supreme Court of Indiana striking out this petitioner's claim of right (its Verified Motion to Dismiss the Appeal) and reversing the judgment of the

trial court with instructions to restate its conclusions of law in conformity with the opinion and to enter judgment for the defendant was rendered on January 14, 1943. A petition for rehearing was seasonably filed, considered by the court and overruled without the rendition of a further opinion on February 2, 1943, and accordingly a mandate was issued to the trial court in conformity with the opinion February 16th, 1943. The judgment reversed was recovered in the stockholder's derivative suit wherein Charles A. Turner, respondent herein, was plaintiff in the trial court and appellee in the State Supreme Court, said petitioner being under the doctrine underlying such suits prevailing in Indiana as elsewhere, was the beneficiary of the judgment reversed, and a necessary party to said suit, being named as co-defendant with its then officers, Gertrude B. Sale and Burwell W. Sale against whom said judgment was recovered and enforceable cancelling certain of its capital stock and ordering the same surrendered to the corporation (this petitioner). Necessarily the petitioner was a party adverse in interest to its co-defendants against whom said judgment was recovered and entitled in its own right to notice of the appeal as required by the statutes of Indiana (which was not given to it) and entitled to defend in its own right against the reversal of the judgment of which it was the real beneficiary. It was a necessary party to the action of the trial court and a necessary party in interest to the proceeding to reverse the judgment on appeal.

This judgment striking out this Petitioner's claim of right based upon and derived from Section 1 of the Fourteenth Amendment of the Constitution of the United States, being in form Petitioner's Special Appearance and Verified Motion to Dismiss the Appeal, necessarily denied and ruled against the said claim of right therein specially set up and specifically asserted to be based upon and derived from said constitutional provision.

This claim of right was that the petitioner was entitled to appear and be bound in the appeal proceedings only by attorneys of its own selection; that it was entitled not to be held to appear and be bound by the dual legal representation purporting to file the assignment of errors below, seeking to reverse the judgment of which under the Indiana decisions it was the beneficiary, when said legal representatives were selected by its adversaries in interest against whom the judgment was recovered and enforceable and who in breach of their trust as officers of the petitioner were acting against its interest in lodging the appeal and in using the same counsel to appear both for petitioner and themselves; and further that it was entitled to notice, as an adverse party, of the taking of the appeal accorded by the Indiana statutes to all persons adverse in interest to appellants and which was indispensable to vest the Supreme Court with jurisdiction of the "vacation appeal," as acknowledged in the opinion of the court below; that it was denied due process of law and the equal protection of the laws by being refused the said notice and by the court proceeding coram non judice to reverse the judgment of the trial court, the petitioner not having been made a party to the appeal proceeding except through the void dual representation.

Hansberry v. *Lee* (1940) 311 U. S. 32, 45, 46;
Glasser v. *United States* (1942) 315 U. S. 60, 76.

The court below avoided mention of any constitutional question but the constitutional claims of petitioner were necessarily denied since the pleading presenting them were struck out on the clearly inadequate and untenable ground that the petitioner was only "a nominal party" and that the final judgment of the trial court forever prohibited stockholders' meetings and consequently the corporation was unable to procure and authorize the counsel presenting

its constitutional claims to appear for it. These questions were necessarily interwoven with the assertion and determination of the constitutional claims. The denial of these claims was not based on any infirmity in procedure or practice. All these questions are, of course, none-the-less for the exclusive determination of this court as is also necessarily the question of the priority of the constitutional claims proper.

II.

Summary of the Case.

Summarily put: The respondent, Charles A. Turner, a stockholder of the petitioner, brought a stockholder's derivative suit to cancel certain shares of common stock of the petitioner, Wabash Valley Coach Co., alleged to have been illegally issued in violation of the statute law, and also to enjoin the holders thereof, the respondents, Burwell W. Sale and Gertrude B. Sale, individually, and as Secretary and President of said corporation, who were at the time the majority stockholders of this petitioner corporation and also the majority of its Board of Directors, from issuing and selling any unissued stock of the corporation for less than par, such sale being inhibited by the applicable statutes. The Wabash Valley Coach Co. was made a party defendant. A judgment was rendered in favor of the appellee below, Charles A. Turner, cancelling as invalid 108.77 shares of the stock in question, and enjoining further sale of stock for less than par, said judgment being for the benefit of petitioner.

An appeal was taken after the term in which the judgment was rendered expired. The assignment of errors was made out in the name of the petitioner, Wabash Valley Coach Co., as an appellant, although it was the party for whose benefit the judgment was obtained and also in the

names of the other losing parties as appellant, the said Sales, individually and as President and Secretary respectively.

No notice was given to the petitioner corporation. The joinder of the petitioner as an appellant against its interest was accomplished through the same attorneys who acted for and were selected by the adversaries of the corporation, the said Sales, who were then the executive officers of the company.

At the next regular annual stockholders' meeting on August 17, 1942, new officers were chosen for the corporation, who selected other counsel for the corporation, who thereafter filed the Special Appearance and Verified Motion To Dismiss the Appeal, setting up the corporation's claim of right under Section 1 of the Fourteenth Amendment of the Federal Constitution to be bound only by counsel of its own free selection and not to be bound by counsel selected by and acting for its adversaries, and contending that the lodging of the appeal was void, and that the Supreme Court of Indiana had no jurisdiction.

The specific claims of constitutional right made in the Supreme Court of Indiana, after the corporation was free from the control of its adversaries are set out in Appendix C of the Petition above, and are described generally in the petition proper, supra, page 8. In the Reasons for the Allowance for the Writ in the Petition, supra, page 18 are set forth the errors assigned in this court in relation to the constitutional right and claim of the petitioner. The State Supreme Court struck out the Motion setting up the Petitioner's claim of constitutional right.

The opinion of the Court did not mention the constitutional claims or any Federal question but decided the case upon the grounds necessarily implicit and inherent in the presentation and determination of the Federal Constitu-

tional questions which are not tenable or adequate or independent non-Federal grounds, constituting in fact mere pretexts to evade the determination of the constitutional question in terms. Of course the ruling of the court in effect necessarily denied these claims.

III.

Summary of Argument.

(1) The petitioner was not notified of the taking of the vacation appeal from the judgment of the trial court required by the pertinent statutes and rules of court to vest jurisdiction in the Supreme Court of Indiana. The case for jurisdiction turns on the challenged validity of the appeal filed in the petitioner's name by and through dual representation which invalidated the appeal under *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45, 46; *Glasser* v. *United States* (1942) 315 U. S. 60, 76, and analogous cases.

(2) The petitioner was an indispensable party to the said appeal and had substantial interest in the judgment rendered by the trial court under the doctrine of the stockholder's derivative suits prevailing in Indiana as elsewhere as the real beneficiary of the judgment. *Carter* v. *The Ford Plate Glass Co.* (1882) 85 Ind. 180, 182; *Davenport* v. *Dows* (1873) 18 Wall. 626, 627; Pomeroy Equity Jur., Section 1095, Vol. 4, p. 276; *Department of Treasury* v. *Crowder* (1941) 214 Ind. 252; *Crimmins etc. Co. et al.* v. *Kidder Peabody Acc. Corp.*, 46 al. (1933) 282 Mass. 267, 270, 271, 4 Fletcher Cyc. Corporations, (1932 Ed.) page 33, Section 5083, note 73. Other citations and discussion in Argument, pages 46-47, below.

(3) Under the laws of Indiana the executive officers of a corporation sustain a fiduciary relationship toward it, and in this instance the respondents, the two Sales, were at the time of the lodging of the appeal the executive officers of the corporation and their act in selecting counsel to procure a reversal of the judgment, also to act and to join the petitioner as an appellant was a contributing factor in vitiating the appeal for want of due process, said officers being the defendants against whom the judgment was recoverable and enforceable. This conduct lacks the elements of fair play.

(a) As to fiduciary relationships:

Wainwright v. *P. H. etc. Roots Co.* (1921) 176 Ind. 682;

Port et al. v. *Russell et al.*, 36 Ind. 60, 65, 66;

Pepper v. *Lytton* (1939) 308 U. S. 295, 306;

Meinhard v. *Salmon* (1928) 249 N. Y. 458;

For other authorities and discussion see Argument, page 49 below.

(b) As to litigation where trustee and *cestui* are opposed in interest:

Groninger v. *Fletcher Trust Co.* (1942) 41 N. E. 140, 141, 142 — Ind. — (not yet in official report)

For other cases and discussion see Argument, pages 44, 47-48, below.

(c) Unauthorized appearance constituting lack of due process under cases decided in this court:

National Exchange Bank v. *Wiley* (1904) 195 U. S. 257, 270 (49 L. Ed. 184, 190);

Hall v. *Lanning* (1875) 91 U. S. 160, 169, 170 (23 L. Ed. 271, 274, 275);

For other authorities and discussions see Argument, page 48 below.

4. Under the Indiana Appeal System the party against whom judgment is recovered appealing therefrom must give notice to a co-defendant who is adverse in interest to him. Section 2-3214 BRS 1933, Rules of Supreme Court—2-1, 2-2, 2-3, 2-30 in Appendix A supra. *Buchanan* v. *Morris* (1926) 181 Ind. 385.

5. Under the Indiana Appeal System the party in whose favor the judgment is rendered may not appeal and an appeal may not be taken to determine costs only. *Clark et al.* v. *Stout* (1914) 183 Ind. 329; *Kaiser et al.* v. *Portage* (1929) 198 Wis. 581; *Wyss* v. *Eskay Dairy Co.* (1934) 99 Ind. App. 620; other authorities and discussion in Argument, page 51, below.

6. The *de facto* doctrine prevails in Indiana with reference to both public officers and officers of private corporations, whose title may not be collaterally attacked and who have power to bind the corporation for whom they act; and one having color of title or a certificate of election together with possession is a *de facto* officer, which was the situation of the officers of the petitioner, there being no competent evidence in the State Supreme Court denying these facts, and the court itself not finding any fact to the contrary against the petitioner. Consequently the newly chosen counsel presenting this petitioner's claim of constitutional right was vested with authority so to do and likewise is vested with authority to file and present the petition for a writ of certiorari on its behalf. *Rule* v. *State* (1935) 207 Ind. 546; *State ex rel. Johnson* (1937) 211 Ind. 327; *Smith* v. *Bank* (1862) 18 Ind. 327; Cases collected in Petition for Writ, p. 11, above, as to what affidavits are competent evidence. Discussion in Argument, page 56, below.

7. The holding of the Supreme Court that the petitioner was only a "nominal party" and without interest in the

judgment below is ill-founded and untenable. This holding was a mere pretext to evade the decision in terms of the constitutional question, which however was necessarily decided by the State Supreme Court in striking out the pleading expressly presenting the claims. The question of the interest of the petitioner is implicit in the assertion and determination of the constitutional question raised by the petitioner and open to review in this court. As to interest see citations under 2 above in this Summary; as to province of this court in determining this question: *Union P. R. Co.* v. *Public Service Commission* (1918), 248 U. S. 67, 70; *Leathe* v. *Thomas* (1907), 207 U. S. 93, 99, and other cases cited above in Petition p. 14.

8. Likewise the holding of the court below that the terms of the final injunction forever interdicted all future stockholders' meetings of the petitioner was unsubstantial and untenable, constituting only a pretext or evasion and subject to the further observations made in 7 above in this summary. See Discussion and Authorities pages 53-55 in Argument below.

9. The appeal proceedings below being *coram non judice* did not constitute due process of law. *Scott* v. *McNeal* (1894), 154 U. S. 34, 46.

Argument.

The opinion of the Indiana Supreme Court acknowledges that the proceedings before it were a "vacation appeal." "Vacation Appeals" fall under Sections 2-3206, 2-3213 and 2-3214 B. Ind. Stat. Ann. (1933), requiring notice to all parties not joining, whether co-parties or adverse parties. No notice was given the Wabash Valley Coach Co.

The court held that notice was dispensed with because the petitioner had joined in the appeal through the agency of the same counsel who also represented the respondents,

Burwell W. Sale and Gertrude B. Sale. The case for jurisdiction below turns entirely upon the validity of this agency or representation, as against the claim of constitutional right of this petitioner. The petitioner contends that this dual representation offends against due process of law and the equal protection of the laws under the Fourteenth Amendment, and the lodging of the appeal was void, and consequently the court had no jurisdiction.

The petitioner relies on *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45, 46 (85 L. Ed. 22, 28, 29) and *Glasser* v. *United States* (1942) 315 U. S. 60, 76 (86 L. Ed. 680, 702).

The *Hansberry* case had to do with the validity of a decree obtained in a class suit, where the members suing had a contingent substantial interest "not necessarily or even probably the same as those whom they are deemed to represent." This Court denied the validity of the decree as to the members thus represented, "because of the dual and potentially conflicting interest between the absent parties and those seeking to represent them."

To the same effect is the holding in *Glasser* v. *United States* (1942) 315 U. S. 69, 76 (86 L. Ed. 680, 702). The court held that due process was denied where counsel were required "to concurrently represent interests which might diverge from the party represented by the attorney, when the possibility of that divergence is brought home to the court."

The test applied in each of these cases required only a possibility or contingency of conflict of interest in order to void the dual representation and deny due process. This petitioner urges that the present case is ruled by these decisions, but that the dual representation here assailed presents even a clearer and more pronounced instance of the same constitutional infirmity. In this case it is not merely a possible or contingent but an actual visible conflict of in-

terest. The representation here is vitiated not merely because it is dual but because it is effected through a breach of fiduciary duty to the petitioner; and, the petitioner being benefited by the judgment was incapable of appealing therefrom.

The principles underlying a stockholder's suit and the fiduciary relationship of the executive officers of the corporation toward the corporation are established in Indiana in common with the Nation at large.

The rationale of stockholder's suits set out in Pomeroy Equity Jurisprudence, Section 1095, Vol. 4, p. 276 (Present Ed), stated as follows:

> "But it is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been directly violated, or because the cause of action is *his,* or because *he* is entitled to the relief sought; he is permitted to sue simply *in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation, and not to the stockholder plaintiff. The corporation is therefore an indispensably necessary party, not simply on the general principles of equity pleading that it be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no such direct interest in the subject matter nor in the relief. In fact the plaintiff has no such direct interest; the corporation alone has a direct interest; the plaintiff is permitted notwithstanding his want of interest to

maintain the action solely to prevent an otherwise complete failure of justice."

This statement of Pomeroy appearing also in earlier editions is approved and followed in *Tevis* v. *Hammersmith* (1903), 31 Ind. App. 281, 283, 284.

In *Carter* v. *The Ford Plate Glass Co.* (1882), 85 Ind. 180, 182, the Supreme Court of Indiana said:

> "The only theory upon which appellants are allowed to maintain this action is, that the Ford Plate Glass Company, whose duty it was to bring and prosecute the suit, was in the hands of its enemies, and therefore could not sue. For that reason, the appellants, being stockholders of the alleged defrauded company, are allowed to sue, the company being the real beneficiary if the suit is successful."

The Carter case is specifically based upon the holding of *Davenport* v. *Dows* (1873), 85 U. S. 626, 627, where among other things, speaking of these suits, it is said:

> "This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation and not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it."

Davenport v. *Dows* is followed by *Porter* v. *Sabin* (1893), 149 U. S. 473, 478, 479:

> "The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only where the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. *Hawes* v. *Oakland*, 104 U. S. 450 (26 L. Ed. 827). The suit is still a suit to enforce a right of the corporation; and the corporation is a necessary party, in order that it may be barred by the judgment."

It has been uniformly held that the corporation is an indispensable party in these suits. As said in *Philipbar et al.* v. *Darby et al.* (1936), 85 Fed. (2d) 27, 30 (C. C. A. 2):

> "It has been the law for over sixty years that the corporation is an indispensable party in such cases."

Sometimes it is said that the corporation is an indispensable party for the reason that it is necessary to bind it by the decree, as in the Philipbar case, *supra,* but in Pomeroy, quoted above and followed in the Indiana cases *supra,* states the reason to be—

> "not simply on the general principles of equity pleading that it be bound by decree but *in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree.*" (Our italics.)

These cases clearly establish that the interest of the respondents, the Sales, against whom recovery was had for the benefit of the corporation both as to the surrendering and the cancellation of their stock, which meant the return of the stock to the control and further issue by the corporation, and as to the injunction against the issue to them of further stock for less than par, was in conflict with the interest of the corporation. Consequently the vice of dual representation falls directly within *Hansberry* v. *Lee* and *Glasser* v. *United States, supra.*

The present instance is so clear that there was even imposed upon the court itself the duty to supply "corrective process where due process of law had been denied." *Brown* v. *Mississippi* (1936), 297 U. S. 278, 286, 287 (90 L. Ed. 682, 687). If no one else sought to rescue the corporation from the hardships of hostile representation, the court itself was called on to do so. In *Groninger* v. *Fletcher Trust Co.* (1942), 41 N. E. 140, 141, 142 (Ind.) (Official Report unpublished), the court observed:

> *"In such cases, of course, neither the fiduciary nor the attorney for the fiduciary should act for the trust, and courts will see that in such cases disinterested persons are appointed to represent the trust."* (Our italics.)

Linebaugh v. Atwater et al. (1898), 173 Ill. 613 (50 N. E. 1004, 1006); *Peoples Bank Co.* v. *Gregory* (1932), 347 Ill. 397 (179 N. E. 856); *Ambos* v. *Glos* (1924), 314 Ill. 438 (145 N. E. 639, 641). Unauthorized appearance of attorney for a defendant produces lack of due process, and a judgment rendered on such appearance is a nullity.

National Exchange Bank v. *Wiley* (1904), 195 U. S. 257, 270 (49 L. Ed. 184, 190); *Hall* v. *Lanning* (1875), 91 U. S. 160, 169, 170 (23 L. Ed. 271, 274, 275); *Shelton* v. *Teflin et al.* (1848), 6 How. 163, 186 (12 L. Ed. 158, 167).

It was not controverted that the dual counsel representation "was obtained in part through the resources and credit of the corporation" (this petitioner) (R. 65), as to effect of which see: *Wilson* v. *The State* (1861), 16 Ind. 392, 395; *Bowman* v. *Bowman* (1899), 153 Ind. 498, 507; *Logan* v. *Logan* (1932), 97 Ind. App. 209 (180 N. E. 32, 34).

In this case the action of counsel for this petitioner selected by the respondents, Sale and Sale, was not merely "rather pro forma than zealous and active" for the corporation as in *Powell* v. *Alabama* (1932), 287 U. S. 45, 48 (77 L. Ed. 158, 165); it was vigorously hostile to the corporation, seeking to reverse a judgment of which it was the beneficiary.

The vice of representation by adverse interests is aggravated in this case because the petitioner's adversaries presuming to represent it were, at that time, also its trustees, namely its executive corporate officers. "Their powers are in trust, the burden is on the director or majority stockholder not only to show good faith of the transaction but also to show its inherent fairness," and the officers "can

not violate the rules of fair play" • • • "can not use his power to his personal advantage but to the detriment of the corporation," • • • "no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements." "Where there is violation of these principles, equity will undo the wrong or intervene to prevent its consummation."

Pepper v. *Lytton* (1939), 308 U. S. 295, 306, 311; *Port et al.* v. *Russell et al.*, 36 Ind. 60, 65, 66; *Zaring* v. *Kelly* (1920), 74 Ind. App. 581, 583 (128 N. E. 657, 658); *Schemmel* v. *Hill* (1930), 91 Ind. App. 373, 383, 385 (169 N. E. 678, 681 682); *Wainright* v. *P. H. & F. M. Roots Co.* (1921), 176 Ind. 682 (97 N. E. 8, 11, 12); *Twin-Lick Oil Co. v. Marbury* (1875), 91 U. S. 587, 588 (23 L. Ed. 328); *Washburn* v. *Green* (1890), 133 U. S. 30, 43 (33 L. Ed. 516, 521). (See also Justice Cardozo's famous opinion in *Meinhard* v. *Salmon* (1928), 249 N. Y. 458 as to the high standard of conduct required of trustees.)

Such practices are not fair play, and when they occur in judicial proceedings they are not tolerated because due process of law forbids, since due process of law is the embodiment of the standards of fair play. *MacDonald* v. *Maybee* (1917), 243 U. S. 90, 91; *Chambers* v. *State* (1940), 309 U. S. 227, 236, 237; *Millikin* v. *State* (1940), 311 U. S. 457, 463; *Mooney* v. *Holohan* (1934), 294 U. S. 103, 112, 113 (79 L. Ed. 791, 794); Dual representation resting on breach of trust should succumb to the same infirmity.

The petitioner under *Carter* v. *The Ford Plate Glass Co.*, supra, and other authorities cited was benefited by the judgment. No judicial fiat could convert it into an appellant from such a judgment. *Clark et al.* v. *Stout* (1914), 183 Ind. 329 (105 N. E. 567); *Kaiser et al.* v. *Portage* (1929), 198 Wis. 581, 582 (225 N. W. 188); *Cantor et al.* v. *Sachs et al.*, 18 Del. Ch. 359, 365, 366, where the court said speaking of a derivative stockholder's bill—

> "Any recovery granted by the decree is necessarily in favor of the corporation."

This accords with Pomeroy's views quoted above, and the compelling reason for joining the corporation initially is not only that it may be barred—

> "but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree."

The relationship created between a corporation and its stockholders by the issue of stock is contractual. *Fletcher Cyclopedia Corporations* (1932), Section 5083, page 33, Vol. 4, Note 73; *Kennedy* v. *Central Power Co.* (1941), 129 Neb. 637 (226 N. W. 504); *Schroeter* v. *Bartlett Syndicate Building Corporation* (1942), — Cal. App. —, 55 P. (2d) 1221; *Crimmins & Peirce Co. et al.* v. *Kidder Peabody Acceptance Corporation et al.* (1933), 282 Mass. 367 (185 N. E. 383, 388); *Department of Treasury of Indiana* v. *Crowder* (1941), 214 Ind. 252 (15 N. E. (2d) 89) recognize the contractual nature of capital stock outstanding and that it is a contingent liability of the corporation to the holder. The suit for the cancellation of the issue of this petitioner's stock to the respondents, the Sales, was in essence a suit for the cancellation of its contract, which required its presence in court. *Shields* v. *Barrow* (1856), 17 How. 139, 141.

But the corporation had also another substantial interest in the judgment, namely, the permanent injunction against the sale of unissued stock for less than par to the two Sales, who were seeking to annul this injunction by reversal. The double interest of the corporation in maintaining the judgment is clear. We submit that it was an indispensable party to the appeal and that its interest was adverse to its fiduciaries who attempted to act for it against its interest.

Thus it is completely demonstrated—First, that the holding of the court below that the corporation petitioner "was only a nominal party" and had no interest is completely unfounded; Second, that under *Pepper* v. *Lytton*, supra, and the Indiana cases supra, declaring the invalidating effect of the fiduciary relationship upon actions by a trustee for his own benefit but injurious to his beneficiary, the holding by the Supreme Court of Indiana, that the lodging of the appeal was valid because it was accomplished by persons who at the time of the lodging were its officers, is without merit and does not reach the contention of this petitioner that such actions were void because they were a violation of the principles above set out, and that the power of the offices, as noted by Mr. Justice Douglas in the court's opinion in *Pepper* v. *Lytton, supra,* itself is subject to the limitation that it can not be used for his own benefit to the detriment of his *cestui,* the corporation itself.

Certainly the corporation could not appeal so that the relief granted it below should not be awarded to it.

The mere circumstance that a formal judgment was rendered against the petitioner for costs does not create an appealable interest in it.—"This Court will not entertain an appeal for the sole purpose of determining who shall pay the cost." *Wyss* v. *Eskay Dairy Co.* (1934), 99 Ind. App. 620, 622, 623; to the same effect are: *Stauffer* v. *Salimonie, etc. Co.* (1896), 147 Ind. 71, 73; *Manlove* v. *State* (1899), 153 Ind. 80, 81; *Winfield* v. *McCaslin* (1917), 86 Ind. 307, 309.

In this case the officers of the corporation against whom the judgment was recovered undertook by an affirmative act in the name of the corporation, to destroy the benefit of that judgment to their corporation. An appeal is an affirmative act. An assignment of errors upon appeal in Indiana is in the nature of a complaint in the Supreme Court. *Steel* v. *Yoder* (1915) 58 Ind. App. 633 (108 N. E.

783); and *Crumpacker et al.* v. *Manhatten Lumber Co. et al.* (1916) 185 Ind. 493, 494 (112 N. E. 525).

It was the duty of these officers toward the petitioner to resist the reversal of the judgment. The right of the petitioner to resist reversal is not based on statute, but on its constitutional right after term expired to notice and to a hearing in order to defend its property rights, secured to it by such judgment, *Wetmore* v. *Karrick* (1907), 205 U. S. 144, just the same as it is entitled to notice if an ordinary civil action is brought against it.

The then officers of the corporation undertook to purloin the right of the corporation to defend against reversal by using it as an appellant, and it was a Federal Constitutional right which they thereby sought to stifle. Their action was a void waiver of the corporation's constitutional right to notice and to defend. This case is more extreme than even *Johnson* v. *Zerbst* (1937) 304 U. S. 458, 463, 464 for there the question was whether the accused himself had waived his constitutional right but here the corporation was even more helpless than a prisoner at the time the appeal was taken.

Section 2-3214, BRS—1933, does indeed indulge an incorrect designation in the assignment of errors of parties as appellants or appellees, so that an erroneous designation is no longer fatal as formerly, but it does not dispense with notice to a party who is adverse to the appellant, although such party is erroneously designated. For the statute expressly declares:

> "Provided, however, That when notice of such appeal is required to give the court jurisdiction over the appellees or the coparties not appealing, notice shall be served on such coparties in the same manner as is now or may hereafter be required to be given appellees."

The Rules of the Supreme Court do not change the requirements of this Statute, but recognize them. See Rule 2-1, 2-2, 2-3, 2-30 in Appendix.

The holding, or rather intimation, of the court made as the basis for striking out Petitioner's Motion to Dismiss the Appeal, that the permanent injunction forbid all future stockholders' meetings is a transparent fallacy. We quote the text of the temporary injunction itself, which runs:

> "It Is Therefore Ordered, Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held; all until the further order of this court." (R. 2).

The condition upon which the temporary injunction was to be granted was met since the court recites that it

> "is granted under promise and providing that no meetings of the stockholders therein are held; all until the further order of this court."

It is obvious that the reference to no meetings being held was not an order but merely a recital of *modus vivendi* reached by agreement of the parties while the case was *in fieri* below.

We quote Conclusion of Law No. 4:

> "The temporary injunction heretofore granted should be made permanent and continued in full force and effect." (R. 26).

We find here no reference to any promise but the final injunction is awarded as the stark sentence of the law, free from any condition or promise. The occasion for *modus vivendi* had passed. The words of the temporary

injunction "granted as prayed by the plaintiff" shows that no injunction was contemplated transcending the prayer of the complaint which did not pray an injunction against future meetings (See copy of Prayer in Appendix B).

Stockholder's suits are derivative in their nature and it is inconceivable that the corporation had any right either of itself or through a stockholder, to invoke the jurisdiction of a court to prohibit all future meetings of its stockholders. Such an order would lie beyond the prayer and the issues and the competence of the court. *Windsor* v. *McVeigh* (1876) 93 U. S. 274, 282 (23 L. Ed. 914, 917); *Standard Oil Co.* v. *Missouri ex rel. Hadley* (1912) 224 U. S. 270, 287 (56 L. Ed. 760, 770); *N. Y. Life Ins. Co.* v. *Dunlevy* (1916) 241 U. S. 518, 521, 522; *International Ins. Co.* v. *Silverman* (1923) 262 U. S. 346, 350, 351.

It can not be lightly presumed that the trial court decreed what would be an unique and unprecedented act, namely the partial paralysis of the corporate functions of the petitioner, virtually its corporate extinction; or that it either had power or intended to inhibit forever the performance of the statutory requirement of the annual election of the directors (Chap. 35, Sec. 12, p. 96, Ind. Acts 1921). Courts in Indiana have no power to dissolve corporations in whole or in part, in an injunction suit. *Allied Co.* v. *Little* (1926) 199 Ind. 166 (154 N. E. 480).

> "If any part of the record is ambiguous, it is the duty of this court to adopt that interpretation which tends to sustain the judgment." Ideal Cleaning Co. *v.* Mackowiak (1924) 83 Ind. App. 1, 15, 16 (143 N. E. 614).

This insistence that all future stockholders' meetings were interdicted was certainly only in the interest of the two Sales, the executive officers of the company prior to the stockholders' meeting of August 17, 1942. Such an inter-

pretation would be double assurance of their being perpetuated in office, by decree in case the judgment was affirmed, by restoration of their former majority control of the decree was reversed.

This petitioner urges that all these holdings are plainly untenable and are arbitrary pretext to avoid a decision in terms of the Federal question and that this appeal falls under the following cases: *Ward* v. *Love County* (1920) 253 U. S. 17, 22, 23 (64 L. Ed. 751, 758); *Lawrence* v. *State Tax Commission* (1931) 286 U. S. 276, 282, 283 (76 L. Ed. 1102, 1107) and cases there cited: *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.* (1916) 243 U. S. 157, 164 (61 L. Ed. 644, 649); *Leathe* v. *Thomas* (1907) 207 U. S. 93, 99 (52 L. Ed. 118, 120).

These questions are interwoven and intermingled with the presentation and determination of the constitutional questions in the court below and it is the proper province of this Court upon review to determine them:

> "But where the non-federal grounds is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Morgan *v.* Horsky, 178 U. S. 205, 208, 44 L. Ed. 1039, 20 Sup. Ct. Rep. 856; Creswill *v.* Grand Lodge K. P. 225 U. S. 246, 261; 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep. 822, Enterprise Irrigation District *v.* Farmers Mutual Canal Co., supra."
>
> "This court will review or independently determine all questions on which a federal right is necessarily dependent." U. S. *v.* Pink (1941) 315 U. S. 203, 217 (86 L. Ed. 796, 811) and cases there cited.

We note that in passing that counsel for the petitioner who entered special appearance and presented the motion to dismiss was selected by the officers of the corporation who were elected after appeal was taken. A certified cor-

porate record of their election was set out in the motion. This confirmed, at least, color of title. The judgment cancelling the stock of the Sales was then in full force and effect under the laws of Indiana.

That these newly elected officers were in actual possession of their offices and operating the properties of the corporation and that certain of the former officers had recognized them in several instances were set out in the pleadings of the petitioner and were not denied.

It is an axiom of Indiana Law that the title of office can not be tried in a collateral proceeding and that an officer with color of title and in possession is an officer *de facto*, whose actions are binding upon the corporation, private or public. *McGuirk* v. *State ex rel. Gottschalk*, 201 Ind. 650, 657, 659; *Creighton ex. rel. Farras* v. *Piper* (1860) 14 Ind. 182; *Spegal* v. *Krag-Reynolds Co.* (1898), 21 Ind. App. 205, 209 (51 N. E. 959); *Windsor* v. *McVeigh* (1876) 93 U. S. 274, 282 (23 L. Ed. 914, 917).

"An officer *de facto* has such title that his predecessor cannot claim a vacancy and demand the office" (*Quo warranto* case). *Rule* v. *State* (1935) 207 Ind. 546, 552; followed in *State ex rel. Johnson* v. *Clayton* (1937) 211 Ind. 327.

The other rulings of the Supreme Court of Indiana are to the following effect: The appointee of a mayor though not approved by the city counsel; *Rogers* v. *Calumet National Bank* (1938) 213 Ind. 576, 585 (12 N. E. (2d) 261); the officers of a private corporation may be *de facto; Smith* v. *Bank* (1862) 18 Ind. 327, 328; *Bradford* v. *The Frankfort St. Louis etc. R. Co.* (1895) 142 Ind. 383, 392, 393.

The court below did not profess to change the *de facto* doctrine established in Indiana, nor did it profess to change the rule that final judgment cancelling stock operated pending appeal.

The question of the authority of counsel for the petitioner is necessarily implicit in the presentation and determination of the constitutional questions and is not a mere non-Federal question and is reserved for the exclusive determination of this Court.

The court could not proceed to determine any issue in the absence of a party whose present was "necessary to the complete determination of the questions involved." *State of California* v. *Southern Pacific Co.* (1895) 157 U. S. 229, 251; (Section 2-222, BRS—1933) (Being Section 18, Act of 1852—Vol. 2 Rev. St. 1876, p. 39 construed in *Bittinger* v. *Bell* (1879) 65 Ind. 445, 452; *Trent* v. *Edmonds* (1904) 32 Ind. App. 432, 440; *Scobey* v. *Finton* (1872) 39 Ind. 275, 281; *Mahr* v. *Norwich* (1891) 172 N. Y. 471; *Halpin* v. *Savannah R. Co.* (—) 41 Fed. (2d) 329; *Bellaire* v. *B. & O. R. R. Co.* (—) 146 U. S. 16, 17. The cancellation of corporate stock and the enjoining of sale by the petitioner's corporate stock are integral issues not susceptible of division.

The issue of corporate stock can not be valid as to the stockholder and yet void as to the corporation or vice versa, likewise as to an injunction against its issue. Consequently the appeal was *coram non judice* and void under *Scott* v. *McNeal* (1894) 154 U. S. 34, 46.

It is no answer to say the Supreme Court would have passed on the merits to the same effect as the court did, even if the petitioner had been made a party.

In *Coe* v. *Armour Fertilizer Works* (1914) 237 U. S. 413, 424 (59 L. Ed. 1027, 1032) this Court said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees *v.* Watertown, 19 Wall. 107, 123 (22 L. Ed. 72, 77)."

For reference on the subject of the election of the newly chosen officers of the corporation, we note the following cases holding that the judgment is in force pending appeal so that the nullifying fact of the trial court's decree inhibited the voting thereof. These cases are: *Hawkins et al.* v. *State* (1891) 126 Ind. 294; *State ex rel. Matthews* v. *Chase* (1872) 41 Ind. 358; *Central Union Tel. Co.* v. *State* (1887) 110 Ind. 203 (10 N. E. 922—12 N. E. 136); *Febert* v. *Milk Control Board* (1936) 210 Ind. 283 (200 N. E. 688, 689 point (20-21) *Ex parte Meyer.* 102 N. Y. 606 (209 N. Y. 59).

Respectfully submitted,

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Dated: April 7, 1943.

APPENDIX 1.

Extracts from the opinion of the Supreme Court of Indiana.

Points 13 and 14 contain all of the opinion of the court below dealing with and disposing of this Petitioner's Motion to Dismiss the Appeal.

We note, however, the opening paragraph of this opinion, which reads as follows:

"The appellee, a stockholder in the appellant corporation, began this action by a complaint in which the appellant corporation and the appellants Sale were made defendants, the latter both as individuals and as officers of the corporation."

We note also the quotation made by the court on page 214 of the Current Advance Report, 46 N. E. (2d):

"that plaintiff sues in his own right as a stockholder, and on and in behalf of said Wabash Valley Coach Co., and all other stockholders therein, except said Defendants, Sales, aforesaid."

We now quote Points 13 and 14 from the court's opinion (Pages 217 and 218):

"This appeal was perfected by the filing of a transcript of the record and an assignment of errors by all of the appellants on April 22, 1942. The same attorneys appeared for all of the appellants, and they were the attorneys of record for all of the appellants, including the corporation, in the court below. Thereafter, in August 1942, the appellee and stockholders of the Wabash Valley Coach Company other than the Sales undertook to hold a stockholders' meeting of the corporation and elect directors and officers upon the theory that the judgment was self-executing and that the shares of dividend stock were void and of no effect. The officers so elected employed an attorney, who filed in this court, in the name of the corporation, under a special appearance, a motion to dismiss the appeal upon the theory that the corporation is not a proper party appellant, that it had not been served with notice, and for other reasons not necessary to notice. It is obvious that the corporation is a mere nominal party, with no interest in the

result of this action, which is a controversy between stockholders. It is further obvious that the motion to dismiss, filed by an attorney assuming to act for the corporation, but employed by the appellee and the other stockholders having an interest adverse to the Sales, is made in the interest of the appellee, and for the purpose of avoiding a determination of the appeal upon its merits. The appeal was perfected as a vacation appeal, and notice to the appellee was given below. If the corporation had been made a party appellee, notice to its attorneys of record below would have been sufficient to give this court jurisdiction. But the corporation appealed in its own right by appearing in this court, through its attorneys of record below, and filing a transcript of the record below, and filing a transcript of the record and a bill of exceptions. That was sufficient to give this court jurisdiction of the person of the corporation. There is no contention that the attorneys who filed the appeal were not then authorized by the then officers of the corporation to appear for the corporation and perfect the appeal for it. No one else could speak for the corporation as of that date. The other parties appellant were not required to take any further steps to bring the corporation into court, and their appeal cannot be defeated by the effort of new and later officers of the corporation to revoke the action of the former officers. The motion to dismiss is lengthy and based upon numerous highly technical contentions, in view of which we note the suggestion that in the court below there was a temporary injunction as follows: "It Is Therefore Ordered Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held, all until the further order of this Court." The final judgment from which the appeal is taken begins: "It Is Therefore Ordered, Adjudged and Decreed by the court that the temporary injunction heretofore granted in this cause be and the same hereby is made perpetual and permanent, and continued in full force and effect." This seems on its face

to preclude a meeting of stockholders. The special appearance and motion to dismiss is ordered stricken from the file.

"The judgment is reversed, with instructions to the trial court to restate its conclusions of law in conformity with this opinion, and to enter judgment for the defendants."

APPENDIX 2.

Indiana Acts of 1921, Chapter 35, Sections 21, 22 and 23.

Sec. 21. No corporation organized hereunder shall have power to prefer any creditor where any director of such corporation is a surety on the indebtedness preferred, or has been a surety on such indebtedness within four months prior to such preference.

Sec. 22. Every stockholder shall be liable to the corporation for the par value of all stock owned by him, unless such stock has been paid for to the corporation at its par value, or unless the articles of incorporation provide that such stock may be sold at more or less than its par value, in which case the owner of stock shall be liable to the corporation only for the amount of the sale price fixed in such articles until such amount has been paid to the corporation.

Sec. 23. No corporation shall declare or distribute any dividend to preferred stockholders or to common stockholders, except from the profits earned by the business of the corporation, and if any such distribution shall be made, the directors shall be personally liable to creditors to the extent of all such distribution, and the stockholders shall be liable to refund such dividend received by them, but nothing herein shall prevent a corporation from paying dividends on its preferred and common stock if it is accumulating, in good faith, a sinking fund sufficient to pay deferred debts, and if there is reason to believe in good faith that it will be able to continue accumulating such funds to pay deferred debts.

APPENDIX 3.

Indiana Acts of 1921, Chapter 206, Sections 1 and 2.

Sec. 1. Be it enacted by the general assembly of the State of Indiana, That it shall be unlawful for any person, firm, company, corporation or association, except while in the process of dissolution, to declare or pay any dividends on any stock issued by, such person, firm, company, corporation or association out of any funds derived from the sale of stock, or out of any other funds, belonging to such person, firm, company, corporation or association, except actual net earnings, surplus or undivided profits.

Sec. 2. Any such person, member of a firm or company, or director of such corporation or association who shall vote for or assent to the payment of any such dividends to any such person above referred to, out of any other funds except actual net earnings, surplus or undivided profits shall be personally liable for twice the total amount of such dividends and also for a reasonable attorney fee for recovering the sum, which suit may be brought by the State of Indiana, on the relation of the prosecuting attorney or on the relation of any person financially interested in said matter.